LETTER TO THE EDITOR

Dear Editor:

In an article in the May 1993 issue of *Corporate Legal Times*, Michael J. Astrue, a former general counsel of the U.S. Department of Health and Human Services, suggested that employers should ban smoking in the workplace to avoid potential liability to non-smoking employees ("EPA Ruling on Secondary Smoke Creates Risk for Employees," pg. 456). Astrue believes that the recent U.S. EPA report classifying environmental tobacco smoke (ETS) as a Group A carcinogen will fuel disability and other claims.

Astrue overestimates the significance of the EPA report, and his discussion of the pertinent case law is wide of the mark. There have been few successful workplace claims based on ETS exposure, and it is unlikely that the EPA report will change this.

The fact that a substance has been given the Group A label does not mean it must be banned. Group A substances are common. They include benzene, which is emitted from barbecue grills, gas-fired stoves and drinking water; and nickel, which is used in kitchen utensils and tableware.

The U.S. Occupational Safety and Health Administration typically does not ban Group A substances in workplaces. OSHA, not EPA, has regulatory authority over workplace smoking, and OSHA currently is considering whether ETS presents an occupational risk. The vast majority of workplace smoking studies (which EPA ignored in its report, but which OSHA must consider) report no statistically significant increase in overall lung cancer risk. EPA's conclusion that ETS is capable of causing cancer in humans has drawn, and continues to draw, criticism.

Astrue suggests that the Americans with Disabilities Act requires a complete ban on smoking in the workplace. In promulgating rules implementing the ADA, however, the U.S. Equal Employment Opportunity Commission made clear that sensitivity to environmental agents such as ETS does not automatically constitute a "disability." The U.S. Court of Appeals for the Sixth Circuit specifically has held (in *Pletten v. Merit Systems Protection Board*, 1990 U.S. App. LEXIS 11900 (6th Cir. 1990)) that providing an individual with a "totally smoke-free environment" goes beyond the government's obligation to provide "reasonable accommodation" under the parallel provision of the Rehabilitation Act of 1973.

Astrue also predicts that state workers' compensation suits based on workplace exposure to ETS increasingly are likely to succeed. But the very few cases in which non-smoking employees have been awarded workers' compensation involved an unusual combination of two elements: the non-smoking employee was found to be "hypersensitive" to ETS or to suffer from a pre-existing medical condition found to be aggravated by ETS, and the employer had forced the non-smoking employee to share his or her immediate workspace on a sustained basis with smoking employees. It is evident as well in these cases that the workspace was inadequately ventilated.

The decided cases make clear that employers need not ban smoking to minimize the risk of claims by non-smoking employees. The key is a policy that provides employees with an adequately ventilated working environment and does not force objecting nonsmokers to share their immediate workspace on a sustained basis with smoking colleagues.

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